No. 214.

Brf. of Becker for Appellee.

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BRIEF FOR APPELLEE.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900.

Filed Feb. 14 25, 1901.

THE TOWN OF TONAWANDA, NEW YORK, AND JOHN K. PATTON, SUPERVISOR OF SAID TOWN, APPELLANTS,

vs.

JAMES B. LYON.

TRACY C. BECKER, BUFFALO, N. Y.,
Counsel for Appellee.

EDWARD C. MASON AND RALPH T. KELLOGG, BUFFALO, N. Y., *Counsel for other Land Owners on this Brief.*

(17,657.)

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THE TOWN OF TONAWANDA, NEW YORK, AND JOHN K. PATTON, SUPERVISOR OF SAID TOWN, APPELLANTS,

vs.

JAMES B. LYON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

BRIEF IN BEHALF OF THE APPELLEE.

Statement of Facts.

This action in equity was brought by the appellee, a citizen of the State of New York, to enjoin the collection of an assessment levied by the appellants, citizens of the same State, upon the lands of the appellee for the expense of paving a country highway on which those lands abutted, on the ground that the statute authorizing the assessment was in contravention of the Constitution of the United States, articles V and XIV.

The cause first came before the Circuit Court for decision upon the appellant's demurrer and plea (for which the amended demurrer and plea (Record, pp. 16–25) were afterwards substituted *nunc pro tunc*), and a brief stipulation of facts (Record, pp. 34–35). The court overruled the demurrer and plea with leave to answer. In rendering this decision, the Hon. Alfred C. Coxe, district judge sitting as judge of the Circuit Court, exhaustively and comprehensively examined and considered the questions involved (Record, pp. 35–53).

(Lyon v. Town of Tonawanda, 98 Fed. Rep. 602.) While the appellant afterwards answered (pp. 27–29), the issues were in no wise changed thereby, the allegations contained in the answer being conclusions of law only, hence the final decree appealed from was granted as a matter of course on the grounds stated in the decision overruling the demurrer and plea.

It is our purpose to state these facts very briefly at this point, so that the court may be in possession of the general outline of this case.

Leaving out of consideration allegations in the nature of conclusions of law, the bill of complaint, plea and answer constitue a consistent whole, and are, in effect, as they were intended to be, an agreed statement of the undisputed facts of the case.

The appellee was, at the commencement of this action, the owner in fee simple absolute, of two tracts of vacant land, situated in appellant town, fronting on an old highway, known as Delaware street, a thoroughfare wholly within appellant town, extending through farming lands from the city of Buffalo to the village of Tonawanda, a distance of about three miles. (Bill, pp. 2–3.)

In the year 1893, the town of Tonawanda paved this highway with vitrified brick on a cement foundation, from end to end, and forty feet wide, at the enormous expense of $232,000 and more.

The appellant town had no authority for making this improvement or incurring this expense, except that conferred by a special or local act of the Legislature of the State of New York, known as chapter 550 of the Laws of 1893. This statute was expressly limited in its application to this Delaware street and a few other parallel highways connecting Buffalo and Tonawanda village, and, it may be stated, to explain what follows, this statute of 1893 was clearly in contravention of the Constitution of the State of New York, which forbids the enactment of a local act providing for the improvement of highways or country roads, as distinguished from city streets, and therefore was, with all proceedings under it, absolutely void.

Constitution of State of New York, art. 3, § 18.

But the town made the improvement in the manner prescribed by this void act, and then proceeded to assess the expense thereof upon the lands abutting on this highway in the exact manner therein prescribed, which was:

> "So much of said assessment shall be raised from each separate lot or parcel of land fronting on any highway to be improved as shall be in the same proportion to the entire amount assessed as the number of feet for which the same shall bound

or front on any highway improved shall be to the aggregate number of [illegible] or frontage or bounds subjected to said assessment. * * *"

Chap. 550, N. Y. State Laws 1893, § 6.

In this manner there was assessed upon the lands now owned by appellee the sum of $10,413.42.

Owing to the fact that this assessment was so plainly void because the law was unconstitutional, no serious attempt was ever made to enforce it, and only a small amount was paid upon it — nothing on account of that portion assessed against appellant's lands. In fact the assessment was abandoned soon after it was levied. Though several installments became due, no effort was made to sell the lands assessed, and matters remained *in statu quo* until September, 1895, when the appellant town levied an entirely new assessment for the whole expense of this improvement and interest.

The only authority for this second assessment is that contained in section 27 of the act of the Legislature of the State of New York, known as chapter 816 of the Laws of 1895. This statute is entitled:

> "An act enlarging and modifying the powers of town officers in towns within counties having over three hundred thousand inhabitants, and providing for public improvements within such towns, except the counties of New York and Kings."

Except for section 27, smuggled into the middle of the act, by appellant's counsel, and in no way referred to in the title, the statute of 1895 refers entirely to future improvements, and while it is general in form, applying to all towns in counties having over 300,000 population adjoining cities having a population of over 250,000, a reference to the United States census shows that Erie is the only county, Buffalo the only city, and appellant town and three others the only towns which meet its requirements. Hence the act was as local in reality as that of 1893, though it circumvented the Constitution in a most barefaced manner. (Matter of Henneberger, 155 N. Y. 420; 25 App. Div. 164.)

Section 27 of the act of 1895 provides:

> "Where any highway or part of highway within any such town has been paved or otherwise permanently improved under any law providing for the assessment of the expense of such improvement locally, such highway shall be subject to the control and management of said board, and where any part of the expense of making such improvement, including interest on

moneys borrowed, and all other incidental expenses in any wise appertaining to the making of the improvement, or money borrowed for that purpose by the town, shall remain unpaid at the time that this act goes into effect, for the purpose of defraying such expenses and of repaying the moneys borrowed, said board is hereby authorized and empowered, and it shall be its duty to cause to be assessed the entire expense of the improvement aforesaid upon the several lots or parcels of land fronting or bounding upon that part of the highway so improved as aforesaid, and in the manner provided by this statute for making local assessments for raising the expenses of grading and paving of streets; and pursuant to the rules of apportionment and division of the expense herein provided. * * *"

It will be noticed these provisions are mandatory, not permissive. Section 30 of the act of 1895 provides in mandatory language the rule of apportionment and division which shall be followed in assessing the expense of paving a highway:

"Section 30. The expenses of local improvements shall be assessed as follows:

* * * for paving or macadamizing a highway or building lateral sewers or water mains in the middle of a highway, the expense shall be assessed on both sides of that part of the highway in which the improvements shall be made. Frontage assessments shall be apportioned as follows: So much of the expense of the improvement shall be raised from each separate lot or parcel of land as shall be in the same proportion to the entire expense locally assessed as the number of feet for which the lot shall bound or front upon that part of the street in which the improvement shall have been made, shall be to the aggregate number of feet frontage or bounds to be subjected to the entire assessment."

The statute being mandatory, the reassessment of 1895 was made in precise compliance therewith.

The whole expense was divided up and assessed upon the several parcels fronting on the highway in exact proportion to the feet frontage of each parcel. The value, situation with reference to the city and village at either end, depth back from the highway, and the amount of benefit conferred, were all entirely excluded from consideration and in no wise determined or passed upon. The feet frontage of each parcel, the total frontage of all the parcels, and the total of the expense were the only elements which in any wise en-

tered into the simple problem in mathematics which constituted the apportionment of this assessment. The formula laid down by the statute and necessarily applied by the board was: Divide total expense by total feet frontage, multiply the feet frontage of any parcel by the result, and you have the assessment for that parcel.

In this manner there was assessed upon the lands now owned by appellee the sum of $15,854.04. Monthly penalties have been added to this, making the sum due when this action was begun, over $23,000, No portion of this has been paid, and the whole amount became due and payable prior to September, 1896.

Eighty-four separate assessments were levied on as many separate lots. (Plea, p. 24.) These lots varied greatly in depth, situation and value. (Bill, pp. 7–8.) Some necessarily adjoined the city of Buffalo, others the village of Tonawanda, and the rest it is fair to assume (as is the actual fact) ranged from these suburban lots to farms worth less per acre than the value of the suburban lots per square yard. Again, this fine cement and brick boulevard, forty feet wide, must necessarily have benefited the suburban lots and the farms in an utterly different degree. The first assessment was at the rate of $10 per foot front, and the second at the rate of $15 per foot front. (Bill, pp. 2 and 7.) It is quite conceivable that these assessments exceeded in reality the total value of the farms assessed and was vastly greater than the benefit conferred. With their excessive penalties added, they probably do so. The great difference in size of the farm lots as between themselves is shown by the depth of appellee's two parcels — one is 1,012 35/100 feet deep, and the other 3,466 75/100 feet deep. Yet each is assessed the same amount. (Bill, pp. 2 and 7.) Behind the first is of course a tract 2,400 feet deep, which entirely escaped assessment, though in precisely the same situation as 2,400 feet of the rear of the second which was assessed.

The statute provides for the collection of this assessment in the following language:

> "Sec. 45. If any installment of said assessment shall not be paid within one year after the same becomes due and payable, then all the installments shall at once become due and payable * * * and it shall be the duty of the supervisor to advertise said parcel of real estate for sale."

> "Sec. 48. The supervisor shall give notice of the sale of real estate for unpaid assessments by publication of a notice * * * specifying the hour and place of sale. * * * At such time and place he shall offer the property for sale and sell the same to the highest bidder. * * * He shall there-

upon on receiving the amount so bid, issue to the bidder a certificate specifying * * * that at the expiration of one year from day of sale, unless the property shall be sooner redeemed, the bidder * * * shall be entitled to a conveyance of the land sold. * * * If said lands are not redeemed within the year, the supervisor shall execute and deliver a deed of conveyance to the holder of the certificate * * * in the name of the town, by him as supervisor, which conveyance of the lands shall vest the title thereto in fee simple in the grantee * * * and such deed shall be conclusive evidence that the proceedings were regular and valid and taken in conformity to law."

Though the whole assessment upon lands now owned by appellee became due and payable on September 1, 1896, the supervisor, appellant Patton, took no steps towards collecting the same by sale of the lands or otherwise until the month of August, 1899, when the notice of sale required by the statute was duly published, naming September 14, 1899, as the day of sale, and thereupon this action was promptly brought.

The appellant's defense on the trial was based largely upon the ground that appellee was estopped from contesting this assessment of 1895, because the Columbia Land Company was the owner at the time the improvement was made, of the lands now owned by appellee, and signed the consent to the making of the improvement required by the act, chapter 550 of the Laws of 1893.

The facts upon this point are stipulated, and are, that at the time the improvement was ordered in 1893, the Columbia Land Company, a corporation, was the owner in fee of these lands, subject to three purchase-money mortgages, given long prior to the enactment of said statute, chapter 550 of the Laws of 1893, and as such owner it executed the consent to the making of said improvement. This corporation remained the owner of these lands subject to said mortgages until September 7, 1897, when the lands were conveyed on the foreclosure of said mortgages, to the appellee, and two others who afterwards deeded their interest to the appellee. (Stipulation of Facts, pp. 34 and 35.)

Neither the appellee nor his cograntees signed this consent, but derived their title under a mortgage upon the lands, given long before the road was paved or the consents were signed.

Another ground relied upon by appellants is alleged laches on the part of appellee in commencing this action.

The facts upon this point are: The statute of 1893 was so clearly void as being a local act for the improvement of a highway in contra-

vention of the State Constitution, that no attempt was ever made to enforce the original assessment. That assessment became moribund soon after it was levied and was finally superseded by the new assessment levied in September, 1895. About four months after this new assessment was levied, and in February, 1896, several actions were commenced by owners of lands abutting on the highway, in the courts of the State of New York, to set aside both of these assessments, on the ground that the consent in writing of the requisite number of abutting owners to the making of the improvement, had not been obtained. One of these actions, in which Joseph T. Jones was plaintiff, and the present appellants were defendants, was chosen by common consent as a test case. The trial court set aside the assessments and the Appellate Division of the Supreme Court affirmed this judgment. (Bill, pp. 9 and 10; Jones v. Town of Tonawanda, 35 App. Div. 151.)

The Court of Appeals reversed the lower courts in March, 1899 (158 N. Y. 438), sending the case back for a new trial, on the ground that vendees under contracts for the purchase of lands must be counted as "owners."

Shortly after the Jones action was commenced, it was agreed that nothing should be done towards enforcing the assessments until that action was finally determined, and for a period of about two years between the decision of the trial court and that of the Court of Appeals, there was a valid judgment declaring them invalid. This and other actions remained pending until after August 1, 1900.

The appellants did nothing whatever towards collecting the assessment of 1895 until August 1, 1900. Up to that time there was no threatened sale of the plaintiff's lands to enjoin — on the contrary, it was understood that no sale would be attempted. The alleged laches, then, consisted at most in not harassing the appellants when that seemed unnecessary, even assuming that this action could have been maintained before sale was threatened, of which there is serious doubt. It certainly could not have been brought in the New York courts.

Finally, no actual notice to appellee that such an assessment existed is shown, and neither the appellee nor his predecessors in title — the mortgagees of the land — were vested with such an estate as was the necessary foundation of this action until September, 1897, at which time the assessment had been declared void by a competent court.

These are the undisputed facts, and we deem it clear that the only question worthy of serious consideration presented by this appeal, is whether the broad and just principles laid down in the recent decision of this court in the case of Village of Norwood v. Baker (172

U. S., p. 269), still remain the law of the land, and apply to the facts of this case.

Hence, the sole question presented is whether the New York statute (chap. 816 of the Laws of 1895) contravenes the Constitution of the United States, articles V and XIV, in that it provides for the assessment of the expense of the local improvement of a highway, by the frontage rule upon the abutting lands, without reference to or a determination of the benefits conferred thereby upon the several lots.

POINTS.

FIRST.

A State statute which directs municipalities to assess the whole expense of paving any highway therein upon the lands abutting upon the highway so improved solely in proportion to the feet frontage of such abutting lands without regard to the value of such lands or the benefit thereto is in contravention of the provisions of the Constitution of the United States, articles V and XIV, and an assessment made in pursuance of such statute is void.

I.

This fundamental principle we conceive to have been finally established by the recent decision of this court, in which the whole subject of local assessments and the theory upon which their validity rests is discussed with exhaustive research and resistless logic.

Village of Norwood v. Baker, 172 U. S. 269.

The opinion of the court in the Norwood case does not mark a revolution in the law; it does, however, inaugurate a new era of return to old principles long and universally recognized and their logical and just application.

That there is a broad and well-defined distinction between general taxation and special assessments upon abutting lands for the local improvement of highways; that general taxation is based upon the duty to support the government in return for general and indirect benefits conferred upon all, while assessments for local improvements

rest for their sole justification upon the theory of special benefit conferred upon the lands assessed; and that the limit of a local assessment is therefore necessarily the amount of the benefit conferred, are principles as old as our government.

And yet these principles had been so lost sight of in the smoke of the struggle to maintain the freedom of legislatures in matters of general taxation, that they had ceased to govern to any practical extent the levying of local assessments for alleged improvements, and the result has been a period in which legislatures under the ægis of the power to tax, have exercised without practical limit the power to confiscate private property by means of local assessments made without reference to benefits conferred.

By the *Norwood* case, this period of confiscation is ended. The Legislature of Ohio had at last thrown aside all pretense of ordering local assessments on the principle of benefit conferred, and had directed that the total expense of opening or improving highways should be assessed upon the abutting lands in proportion to their frontage on the street improved.

The village of Norwood opened a street through lands all owned by one person, paid her the value of the strip taken, and then assessed upon her remaining lands the whole amount paid, with the expenses of the proceeding added.

While it did not necessarily follow that the amount of this assessment exceeded the benefit conferred upon the remainder of the lands, and there was no evidence in the record on that point, the court seized the opportunity presented by the facts of that case to clear away the fog of confusion which had settled over this vital distinction between taxation and assessments for local improvements and to re-establish on firm foundation in the separate class in which they belong, the essential principles governing the exercise of the power to levy the latter.

The Norwood decision marks the beginning of an epoch of reason and justice in the exercise of this dangerous but necessary power to arbitrarily "improve" a man's property against his will, and yet at his expense. The power surely reaches the uttermost limit of necessity and reason when the right to collect the cost of the enforced improvement is made coextensive with the actual value of that improvement, whether desired or not. And to require that this limit shall be ascertained, not in a purely fictitious manner, but by an actual determination on the facts presented by each case, is the barest justice and the only logical rule which can be devised.

To say that the requirements of reason and right are satisfied by a general determination on the part of Legislature, covering all improvements of a given class, that all abutting lands will be benefited

in proportion to an arbitrary rule of apportionment, is absurd on its face. This involves the assumption that the Legislature considered the question of benefits at all, and the possession on its part of a miraculous prescience which is purely imaginary, fictitious and impossible. If any vitality is to be given the requirement that the assessment shall be limited by the benefit, the existence and amount of that benefit must be found as a fact in each case.

There is no escape from the position of the court, except through sophistry and fiction. And Mr. Justice Brewer frankly places his dissenting opinion on these grounds, not because that position is justified by reason or justice, but because he considers the matter settled by a previous decision of this court, and the tendency of other decisions, to class local assessments under the head of taxation which he believes should not be limited.

II.

It may be urged that the doctrine laid down in the *Norwood* case will upset many assessments made in the era of confiscation just ended, and cause injury and confusion. But as the court says, at page 293 of the opinion:

> "It should be observed that the decree did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment against it. It left the village, in its discretion, to take such steps as were within its power to take either under existing statutes or under any authority that might thereafter be conferred upon it to make a new assessment upon the plaintiff's abutting property for so much of the expense of opening the street as was found upon due and proper inquiry to be equal to the special benefits accruing to the property."

These expressions in the opinion are strikingly illustrated by what has already transpired in the present case.

The appellants have sought and obtained from the State Legislature, since the decree appealed from was entered, ample authority to make a new assessment for the expenses of this improvement after "proper inquiry" and ascertainment of the amount of the special benefits accruing to the several lots. This new act, drawn by appellants' counsel, amply safeguards both the appellant town and the owners of the property to be assessed.

Chapter 307 of the Laws of 1900.

The title expresses its object in these words:

"An Act to provide for the payment of the expense of improving Delaware Road (so-called), in the town of Tonawanda in Erie County."

The first section of this act provides:

"The town board of the Town of Tonawanda is hereby authorized and empowered to ascertain * * * :

"The expenses which have been made or incurred and remaining unpaid on account of the improvement of the Delaware Road from the City of Buffalo to the Village of Tonawanda through said town, made in eighteen hundred and ninety-three and eighteen hundred and ninety-four, by grading, draining, curbing and paving the same, etc."

And the reassessment of the expense so ascertained, one-fifth upon the town of Tonawanda and four-fifths thereof upon the lands lying on either side of the street, within a radius of 2,000 feet back therefrom, is then provided for with great particularity:

All other acts inconsistent with the provisions of this statute are expressly repealed:

"Section 24. All acts and parts of acts inconsistent with this act are hereby repealed."

It is clear that in this case as in all others that may arise, the only result of the doctrine of Norwood v. Baker, is to produce a speedy reassessment on the just lines laid down in that decision.

Under this new assessment, all lands within 2,000 feet of the highway are to be included; the special benefit to each parcel is to be determined, and only four-fifths instead of all the expense is to be assessed on the abutting property.

The readjustment compelled by the decree in this action is fair to all concerned, and instead of injury, a great good has been accomplished.

The appellant town is now engaged in making this reassessment.

III.

The only difference between the assessment in this case and that considered in Norwood v. Baker, is in the precise nature of the local improvement. There it was a case of opening a highway. Here it is the pavement of an existing highway. Surely, the doctrine of

the *Norwood* case is not limited by the court, and cannot be limited, on any tenable theory, so as to include the one kind of improvement and exclude the other. That the court did not contemplate the possibility of so narrow and perverse a construction of its decision is apparent in almost every line of the opinion written with tireless thought and care for the express purpose of establishing a doctrine broad enough to cover the whole field of local improvements.

It is on the distinction which the court finds to exist between general taxation and local assessments for improvements that the decision is based. Every word of the court's argument necessarily applies with the same force to one form of local improvement as it does to another, because the essential principle of benefit on which the court rests its decision underlies in precisely the same degree all assessments made for improvements. Throughout the opinion, the court discusses the problem presented as one of local assessments in general, without the slightest suggestion that there can possibly be any distinction between them, or that there was anything peculiar about the particular improvement made by the village of Norwood. Indeed, if the decision is to be limited at all, it would be quite as well to confine its operation to that now famous village, and make it the one spot where legislatures may not confiscate private property,— which would be quite as logical as the limitation the appellants urge, and less difficult to remember.

While appellant's counsel is fertile in suggestions as to possible grounds on which the court might yet exclude the pavement of streets from the operation of its decision, he does not pretend to offer any logical reason for such a limitation. The chief of these suggested sophistries seems to be, in his estimation, the wholly immaterial fact that in the *Norwood* case there had been an actual taking of private property — but as the court is careful to point out (at page 277 of the opinion), this fact had no possible bearing on the decision in that case, for the land taken had been paid for in full and no complaint on the score of that taking could be, or was, made. Another suggested subtlety, without force or logical point, is the fact that street paving and frontage assessments therefor are common — so are frontage assessments for opening and extending streets. Indeed, if the distinction is to be made between those improvements which are common and those which are not, we submit that the paving of country highways is quite the most uncommon of all. Of similar character are all the objections urged to what appellant's counsel is pleased to call "extension of the doctrine." It seems to us wholly unprofitable to seriously discuss all of these abortive efforts to accomplish what is, in the nature of things, impossible. It is puerile to urge that a limitation of this doctrine to any special class of local

improvements can be successful. Any such distinction must necessarily overrule the *Norwood* case, and there would then follow a far worse condition than existed before that decision, because all doubt of the unlimited right of the Legislature to disregard all pretense of assessment according to benefits would be removed.

We cannot believe that this court, which has so recently promulgated a doctrine so sound in principle and so beneficent in its results, after most serious and solemn consideration of every conceivable reason and argument for and against it, can hesitate for an instant to end all frivolous discussion as to whether that doctrine so lucidly stated is really the law of the land — in other words, whether this high court means what it has once said.

Nor do we believe that the court needs the assistance of inferior tribunals to elucidate an opinion which is as clear and unambiguous as language can make it. Still the almost universal agreement of all the courts which have construed (if that word is permissible here) the doctrine of this case, is evidence, though none be needed, that our position is right.

Fay v. Springfield, 94 Fed. Rep. 409.
Loeb v. Trustees, 91 Fed. Rep. 409.
Charles v. City of Marion, 98 Fed. Rep. 538.
Lyon v. Town of Tonawanda, 98 Fed. Rep. 361.
Cowley v. City of Spokane, 99 Fed. Rep. 840.
Hutchinson v. Storrie, 92 Tex. 688.
Sears v. Commissioners, 173 Mass. 350.
Adams v. City (Ind.), 57 N. E. Rep. 114.
McKee v. Town of Pendleton (Ind.), 57 N. E. Rep. 532.
Dexter v. Boston (Mass.), 57 N. E. Rep. 379; 103 Fed. Rep. 357; 103 id. 363.
Vol. 51, Central Law Journal, 243 (where most of these decisions are collated and discussed).

IV.

No object could be subserved by entering into a discussion of the earlier authorities on this question, since the decision of this court in the *Norwood* case must be deemed final. And even if the question were still open, any argument in support of the court's conclusion must necessarily be a mere repetition of the opinion of Mr. Justice Harlan.

All the New York cases relied upon by appellant have recently been considered and distinguished in the exhaustive opinion of Justice HERRICK, in the case of *In re* Klock (30 App. Div. 24).

SECOND.

The New York statute, chapter 816 of the Laws of 1895, which authorized the assessment the collection of which is enjoined by the decree herein, prescribed that the whole expense of paving any highway should be assessed upon the abutting lands solely in proportion to the frontage thereof on such highway, without regard to the value of such lands or the benefit thereto, and was therefore unconstitutional and void.

I.

Delaware street was paved, as set forth fully in the statement of facts at the beginning of this brief, in the year 1893, in pursuance of an earlier statute, chapter 550 of the Laws of 1893, which provided for the assessment of the whole expense of that improvement upon the lands fronting on the highway. The assessment made under this earlier act was abandoned because that statute was clearly in contravention of the Constitution of the State of New York, prohibiting the enactment of local statutes for the improvement of highways. (Constitution of the State of New York, art. I, sec. 8.) While the bill of complaint sets up in full this first assessment, and its collection is enjoined along with that levied under the act of 1895, it is conceded that the earlier assessment was superseded by the later one, and it seems unnecessary to weary the court with a consideration of the earlier act or the assessment made thereunder. All the facts relating to that first act and assessment, including the material section of the act itself, are, however, fully set forth in the foregoing statement of facts, if they be considered material.

In the year 1895 the Legislature of New York enacted chapter 816 of the Laws of 1895.

That statute provided for the improvement of any highways situated in towns of 3,000 or more inhabitants, in counties having a population of 300,000 or over, adjoining cities of 250,000 or more population. While this act was really local, applying actually to but four towns, including the appellant, it safely circumvented, in that respect, the State Constitution. All its provisions, with the exception of one section, applied to future improvements. But section 27, in-

terjected into the middle of it, and not referred to in the title, contained this provision:

> "Where any highway or part of highway within any such town has been paved or otherwise permanently improved under any law providing for the assessment of the expense of such improvement locally, such highway shall be subject to the control and management of said board, and where any part of the expense of making such improvement, including interest on moneys borrowed, and all other incidental expenses in any wise appertaining to the making of the improvement, or money borrowed for that purpose by the town, shall remain unpaid at the time that this act goes into effect, for the purpose of defraying such expenses and of repaying the moneys borrowed, said board is hereby authorized and empowered, and it shall be its duty to cause to be assessed the entire expense of the improvement aforesaid upon the several lots or parcels of land fronting or bounding upon that part of the highway so improved as aforesaid, and in the manner provided by this statute for making local assessments for raising the expenses of grading and paving of streets; and pursuant to the rules of apportionment and division of the expense herein provided."

This section, then, directed the appellant town to reassess the expense of paving Delaware street upon the lands abutting thereon, in the manner and according to the rules of apportionment provided elsewhere in the statute for the assessment of the expense incurred in paving highways in the future.

The provisions so referred to are those contained in section 30, and are:

> "The expenses of local improvements shall be assessed as follows: For building or repairing sidewalks, by frontage assessments upon the lots in front of which the walk shall be constructed or repaired; where a lateral water main or lateral sewer is built or repaired for the benefit of the lots on one side of the highway, upon such lots; for paving or macadamizing a highway, or building lateral sewers or water mains in the middle of a highway, the expense shall be assessed upon the lots fronting or bounding on both sides of that part of the highway in which the improvement shall be made. Frontage assessments shall be apportioned as follows: So much of the expense of the improvement shall be raised from each separate lot or parcel of land as shall be in the same proportion to the entire expense

locally assessed, as the number of feet for which the lot shall bound or front upon that part of the street in which the improvement shall have been made, shall be to the aggregate number of feet of frontage or bounds to be subjected to the entire assessment."

As the statute was mandatory, the officers of appellant town, about September 1, 1895, reassessed the total expense of paving Delaware street in the exact manner prescribed thereby, levying on each lot fronting on the highway an amount in the same proportion to the total assessed as its feet frontage on the highway was to the total feet frontage on both sides of the highway. In other words, the town officers assessed the expense by the simple mathematical rule of dividing the total of expense by the total number of feet frontage, and multiplying the feet of frontage of each parcel by the result. Neither the value of the several parcels, nor the amount of the benefit conferred were considered or ascertained.

II.

That the act of 1895, in mandatory language required this assessment to be made on precisely the arbitrary and mathematical rule adopted by the appellants, and necessarily excluded all consideration of the amount of the benefit conferred upon the several lots, would seem too clear to require argument.

But the appellant's counsel made an ingenious contention upon the trial which deserves a passing notice, though it can hardly have been suggested seriously. The learned trial judge describes and disposes of this absurd proposition, born of desperation, in the following language:

"'The expenses of local improvements shall be assessed as follows:

"'For building or repairing sidewalks, by frontage assessment upon the lots in front of which the walk shall be constructed or repaired.'

"It is argued that because the word frontage is here used, the elaborate provision for the apportionment of 'frontage assessments found at the end of the section applies only to sidewalks. Such a construction violates several well-known canons of statutory interpretation. It eviscerates the section, leaving it ambiguous, if not inoperative, as to the more important subjects treated by it. The section provides that the expenses for paving a highway shall be assessed upon the lots fronting or bound-

ing thereon, and then declares that frontage assessments shall be apportioned by the front-foot rule. An assessment upon lots fronting on a highway is 'a frontage assessment' to the same extent as if the words quoted had been used; that the front-foot rule does not relate to sidewalks only is manifest from the language of the last clause of the section. The language requiring the assessments to be levied in proportion as the number of feet 'bound or front' upon the street, probably refers to the local improvements mentioned in all the preceding clauses; it certainly refers to 'lots fronting or bounding' on the street, as described in the clause which immediately precedes it. If the legislature had substituted the words 'assessments upon lots fronting on the street' for 'frontage assessments,' so that the sentence in question would read, 'Assessments upon lots fronting on the street shall be apportioned as follows,' there could be no possible pretense for the contention of the defendants, and yet it is thought that this was unquestionably what the lawmakers meant. Any other construction leaves the section without any definite and certain provision regarding assessments for the most important improvements sanctioned by the law. An interpretation which renders an act meaningless or obscure should always be avoided. That the construction here approved was recognized by all as the proper one prior to the rise of this controversy, is demonstrated by the fact that the board, acting upon the advice of counsel learned in the law and familiar with all the facts, assessed the complainant's lots according to the front-foot rule.'"

III.

The appellants also contend that the court should assume that both the Legislature, in directing, and the town officers, in making, this assessment, actually determined that the benefits conferred would be, and were, in proportion to the assessments directed and made. It is clear that this is merely a restatement of the theory advanced by the minority in the *Norwood* case, that an imaginary and fictitious determination of benefits by the Legislature, physically impossible because not made with any reference to known or existing facts, is sufficient.

It is precisely this sophistry which the court refused to accept and apply in the *Norwood* case, and the facts there and those now before the court are precisely the same in this respect.

There is no pretense that either the Legislature or the town did anything which was not done by the Legislature of Ohio and the vil-

lage of Norwood. The Legislature here, as there, adopted an imperative general rule, and the town officers had no power to resist its application. Their duty was defined and limited, and could not be performed in any other way than that directed. No determination of benefits which they might have made could have had the slightest scintilla of validity, and, in fact, no such determination was made by them. The argument that they must be presumed to have done their duty, advanced by appellants' counsel, works to a result not intended by him — their duty was to assess solely by the front-foot rule — hence, it is to be presumed that they did not act in some other way.

IV.

Clearly, the rule of apportionment provided by the act of 1895, and followed in levying the assessments upon the appellee's lots, was the front-foot rule, pure and simple, and excluded from all consideration the benefits conferred.

THIRD.

The appellee has no adequate remedy at law, and an action in equity to enjoin the collection of this void assessment by the threatened sale and conveyance of appellee's lands was properly maintained.

I.

Where an assessment is wholly void because levied under an unconstitutional statute, and that statute provides for the sale of the lands assessed on default in payment, and the delivery of a deed conveying the title in fee to the purchaser, and makes the deed conclusive evidence of the validity of the assessment and sale, "and conclusive evidence that the proceedings were regular and valid and taken in conformity to law," and such sale is actually threatened and about to occur, an action in equity may be maintained to permanently enjoin the collection thereof.

Village of Norwood v. Baker, 172 U. S. 269.
Tingue v. Village of Portchester, 101 N. Y. 294.
Vaughn v. Village of Portchester, 135 N. Y. 460.
Fay v. The City of Springfield, 94 Fed. Rep. 409
(and all the cases above cited under Point First).

The *Norwood* case established the principle that such relief by bill in equity will be granted in precisely these circumstances. As the question was under the United States Constitution, and the action originated in the Federal courts, the rules of those courts as to the remedy must prevail.

But as will be seen from the decisions cited above, if it be deemed material, the New York courts, under the same circumstance, would grant this same relief by injunction where proceedings to sell had been actually instituted, this being the line in New York between those cases where relief by injunction will be granted and those where it will not.

II.

That the appellee's lands were actually advertised for sale when this action was commenced; that the statute provided for such sale and conveyance, to the purchaser, of the fee in the lands, by deed, which is made conclusive evidence of the validity of the assessment and that all proceedings were regular and valid and taken in conformity to law, areall facts established by the record and conceded.

Statement of Facts, *supra*.

III.

Appellants' assertion that the statute and the Code of the State of New York provide an adequate remedy at law, by certiorari to review, is wholly untenable and without merit.

The review by *certiorari* provided for by the statute and Code could in the nature of things reach only such defects and inequalities in the roll as appellants' officers had power to correct. There was no question of *correction* here, because the assessment had been made exactly as the law required, and there was no power to make any change. On *certiorari* the court can act only through the town officers by commanding them to do something which they have the power to do. There being no power to change, *certiorari* could have given no relief whatever.

FOURTH.

The Circuit Court rightly held that appellee was not estopped from contesting this assessment.

I.

The facts on which this claim of estoppel is founded by appellants are so elaborately set forth in the statement of facts which precedes

this argument that we may be permitted to repeat them only very briefly here.

In July, 1893, the Columbia Land Company, the owner of the land of appellee at the time, subject to mortgages given in 1891, executed the consent to the improvement required by the act of 1893; the plaintiff had no interest in the property until September, 1897, when he acquired it, not through the Columbia Land Company, but by referee's deed on foreclosure of the mortgages, which were a valid lien upon the property from a time long prior to 1893. Neither the appellant nor any persons through whom his title was derived signed this consent; nor does it appear that appellee, or his predecessors in title, had any actual knowledge of the making of this improvement.

How the shadow of estoppel can be predicated on these, the admitted facts, it is very difficult to conceive, especially when this defense of estoppel is set up, not as to the assessment of 1893, but as to the reassessment of 1895, to which neither the Columbia Land Company, nor anyone else, had the opportunity to consent or protest.

The Columbia Land Company was in no sense a predecessor in title of the appellee and no privity in interest exists between them, for the title of the appellee relates back to 1891, when the mortgages through which the title comes were executed. Clearly, nothing which subsequent owners of the equity of redemption might do, after that time, could affect the title so derived.

The appellee received nothing from the Columbia Land Company. His title is derived from a prior hostile source and came to him, not through, but in spite of that company, as the result of an action successfully maintained against it.

To hold the appellee estopped by these acts of a hostile stranger to his title, from whom he has received nothing, and in whose place he does not stand, would be a strange perversion of those principles of equity upon which the doctrine of estoppel *in pais* is founded, and requires an extension of that doctrine far beyond its well-defined limits purely to accomplish an unnecessary wrong.

Brant v. Virginia Coal & Iron Co., 93 U. S. 326, at pages 335–336.
Steel v. Smelting, 106 U. S. 447, at pages 455–456.
Coan v. Osgood, 15 Barb. 588.
Carver v. Astor, 4 Pet. 1, at page 83.
Oliver v. Piatt, 3 How. 333, at page 412.
Sabariego v. Maverick, 124 U. S. 261, 264.
Corning v. The Troy Iron & Nail Factory, 40 N. Y. 191.

II.

More, however, the appellants have failed to establish facts sufficient to justify the conclusion that even the Columbia Land Company would be estopped from contesting the assessment of 1895, were it now the owner of the lands and the plaintiff in this action.

The learned trial judge places his decision upon this broad ground as well as upon the proposition that the acts of the Columbia Land Company could not bind this appellee.

His conclusions on this whole question of estoppel are so cogently expressed as to leave nothing more to be said:

> "First. Even though the complainant was in privity with the Columbia company, an assent to be assessed under the law of 1893 was not an assent under the law of 1895, with all its changed conditions and additional burdens.
>
> "Second. A petition for an improvement is not a petition for an illegal assessment.
>
> "In all the company's acts there is nothing inconsistent with the theory that it supposed the expense of the improvement would be lawfully and justly apportioned. It did not assent to extortion or to confiscation or to the taking of its property for public use without compensation.
>
> "Third. As the law under which the proceedings were instituted was unconstitutional and void, the consents given thereunder were inoperative and bound no one.
>
> "That in the circumstances here, where neither the Columbia company nor the complainant has received any advantage or retained any benefit under the law, the right to assert its unconstitutionality was not and could not be waived.
>
> "Fourth. The essential elements of an estoppel are lacking, there being nothing to show that the defendant relied upon the company's acts or were misled thereby. There is nothing to show that the petition and consent induced the improvement. For aught that appears to the contrary, the pavement would have been laid precisely as it was laid if the Columbia company had never existed. No injury to the defendants or benefit to the complainant followed from these acts.
>
> "Fifth. The complainant is not in privity with the Columbia company. His title is derived from prior purchase-money mortgages, and since he obtained title he has maintained a position of open and avowed hostility to what he insists is an illegal tax.

"It may well be doubted whether the complainant was in privity with the Columbia Land Company. His title was derived from a conveyance prior to the deed to the company. The company held only the equity of redemption and could do nothing to impair the value of a prior mortgage. The complainant's title did not come from or through the company; it came from a source which was paramount, prior, and in a sense hostile to the company's title."

A decision of the New York Court of Appeals is directly in point, holding that one who consents to an improvement is not estopped from contesting it on the ground that a sufficient number of other consents has not been obtained.

In the Matter of Sharp, 56 N. Y. 257, at page 259.

FIFTH.

The Circuit Court rightly decided that the appellee had not been guilty of such laches as should prevent him from maintaining this action.

I.

As we demonstrated with great care at the outset (statement of facts), from the time the assessment of 1895 was levied in September of that year down to August 1, 1899, there was no period at which there was the slightest reason for starting this action. From February, 1896, to August, 1899, several actions brought by other persons against the appellants were pending in the State courts to set aside the assessment on other grounds, and it had been generally understood and agreed that no attempt would be made to collect any of the assessments until after those actions were finally decided, and for a period of more than a year there was in fact a valid judgment granted by a competent court and affirmed by the Appellate Division of the Supreme Court, declaring the assessment void and enjoining its collection.

Jones v. Tonawanda, 35 App. Div. 151.

While the Court of Appeals finally reversed that judgment, directing a new trial, this did not occur until March, 1899, and the action was not finally disposed of until about August 1, 1899, when, for the first time, proceedings to enforce the assessment were threat-

ened and taken. During all this period, negotiations looking towards reapportionment of this expense on lines of greater justice were being carried on. Prior to August 1, 1899, there was no threatened sale of appellee's lands to enjoin. Immediately after that day and on September 13, 1899, the bill herein was filed.

It is hardly necessary to remark that the appellants cannot be permitted to go back of the assessment of 1895 to discover this alleged laches, since the appellee certainly could not commence an action to enjoin the collection of the latter before it existed.

And it further appears that neither the appellee nor his predecessors in title were the owners of such a title as was the necessary foundation of an action until September, 1897 at which time there was a valid judgment declaring the assessment void.

If the appellee had commenced this action sooner than he did, he would have done it without other object, purpose, or result, than to unnecessarily harass the appellants. Moreover, there is no evidence whatever that any injury was suffered by the appellants in consequence of the postponement of action by the appellee until a time when there existed a sound reason for it.

If any authority is needed on so evident a proposition as that here presented, it will be found in a decision of the New York Court of Appeals upon facts which happen to be of a similar nature, though vastly stronger, because the gravamen of the petition there was irregularity, not absolute illegality, and the delay was seven years.

Matter of Lord, 78 N. Y. 109.

SIXTH.

The Circuit Court committed no error in deciding that it was not incumbent upon the appellee to show definite injury, to entitle him to the relief granted.

I.

This we conceive to be the vital principle of Norwood v. Baker — the precise point for which that decision stands.

The court takes great care that there shall be no misconception of the doctrine it intends to promulgate, and, with this object in view, distinctly and emphatically, calls attention to the absence of any proof that the assessment is greater than the benefit conferred by the improvement. It does not avoid this issue, but seeks it; does not even cover up the absence of proof with the suggestion of inferences which might supply it. There is no veneering, no

glossing over, but a direct and intentional assertion that this proof is not to be found in the record, even in the form of suggestive probability.

To overlook this, the pith of the decision, is to be wholly and purposely unseeing, for the language of the court is:

> "It is said that a court of equity ought not to interpose to prevent the enforcement of the assessment in question, because the plaintiff did not show, nor offer to show, by proof that the amount assessed upon her property was in excess of the special benefits accruing to it by reason of the opening of the street. This suggestion implies that if the proof had showed an excess of cost incurred in opening the street over the special benefits accruing to the abutting property, a decree might properly have been made enjoining the assessment to the extent simply that such cost exceeded the benefits. We do not concur in this view. As the pleadings show, the village proceeded upon the theory, justified by the words of the statute, that the entire cost incurred in opening the street, including the value of the property appropriated, could, when the assessment was by the front foot, be put upon the abutting property, irrespective of special benefits. The assessment was by the front foot and for a specific sum representing such cost, and that sum could not have been reduced under the ordinance of the village, even if proof had been made that the costs and expenses assessed upon the abutting property exceeded the special benefits. The assessment was in itself an illegal one because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was, therefore, the only appropriate one."

And in the mind of Mr. Justice Harlan, who wrote that opinion, there was no uncertainty as to its results or the meaning it would convey. Its whole purpose is to bring to a suffering people a practical and effective relief from the unreasonable and unjustifiable theories of the divine right of legislatures to confiscate in the name of taxation.

And that is why Mr. Justice Harlan places that decision on the broadest grounds, and with endless pains excludes every possibility of limitation or distinction which might break its intended force and effect.

II.

We do not believe it to be material in the slightest degree, but the facts presented in this case afford the strongest basis for at least the

reasonable inference, that the assessment upon the appellee's lands was in excess of the benefits conferred, and probably greater than the total value of those lands. The road improved is not a city street with lots bordering on it of small frontages and great proportionate value, but a country highway running through large tracts of vacant land with frontages running up to hundreds, even thousands of feet (the plaintiff himself having a frontage of more than a thousand feet), and yet this highway is paved with cement and brick to the extraordinary width of forty feet throughout its length of three miles, making of it a great thoroughfare between a large city and a populous village, and the cost, all thrown on the adjoining farms, in the middle, and the suburban lots, at either end, assessed entirely by the frontage rule, amounts to $10 for each foot of frontage, without interest, and to nearly $15 with interest. The plaintiff's total assessment for this "improvement" being $15,000 on these two farms — to which, if the assessment were now sustained, would be added nearly $7,500 more in penalties for nonpayment.

Is it not a fair assumption that the cost is greater than the gain? — That the total is more than the land is worth?

Again, there are eighty-four lots assessed in all. Is it conceivable that injustice was not done to some of these lots, where all are assessed on the same mathematical basis, without regard to their value, or depth? When they must necessarily range from city and village lots at either end, to farms like the plaintiff's in the middle? One of plaintiff's farms is 1,000 feet deep, the other 3,400 feet deep. Yet they are assessed within a few dollars of the same amount, and a tract 2,400 feet deep behind the first, shares no part of the expense, while it is in precisely the same position as 2,400 feet in the rear of the other which *is* assessed.

Clearly it might be asserted with reason that assessment beyond possible benefit is here shown.

SEVENTH.

As a statute, chapter 307 of the Laws of 1900, has been enacted by the New York State Legislature since the decree was granted herein, repealing all inconsistent laws and authorizing the reassessment, on just lines, of the expense of this improvement, the injunction forbidding a sale under the assessment of 1895 should now stand in any event.

The purpose of pressing this appeal since the enactment of this statute, is a mystery which we are unable to solve.

As we have shown, quoting largely from its provisions (Point First), the Legislature, as a result of the decision by the Circuit Court in this case, passed in March of 1900, a statute drawn by appellants' counsel, which authorizes the reapportionment, on equitable lines, of the whole expense of this improvement, one-fifth thereof upon all the taxable property in the town, and four-fifths, only, on the lands adjoining the highway, in proportion to benefits accruing thereto, repealing all acts inconsistent therewith.

Chapter 307 of the Laws of 1900.

We are loath to believe that the appellants seek to reverse the decree herein with the object of still enforcing the payment of the assessment of 1895, and its accumulation of penalties, amounting now to one-half the sum in addition thereto. Of course, the penalties would be pure profit to the appellants, but it does not seem possible that the town desires to gain for itself such a profit. And yet the appellants must assume, for some reason unknown to us, that this old assessment is not as yet superseded or vacated by the new act which repeals the law under which it was levied. And what then? The motive behind their present attitude is still inscrutable.

EIGHTH.

The decree of the Circuit Court appealed from should be affirmed, with the costs of this appeal to the appellee.

Respectfully submitted,

TRACY C. BECKER,

Counsel for Appellee,

Buffalo, N. Y.